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No. 95-1103

In the Supreme Court of the United States

OCTOBER TERM, 1995

SETH WAPNICK AND JON WAPNICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the vacatur of petitioners' convictions for substantive violations of the currency transaction reporting laws required the vacatur of their convictions for conspiring to defraud the United States.

2. Whether petitioners were required to file currency transaction reports in connection with their check-cashing business.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Tobacco Co. v. *United States*, 328 U.S. 781 (1946)	7
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)	7
Griffin v. *United States*, 502 U.S. 46 (1991)	6
Ratzlaf v. *United States*, 114 S. Ct. 655 (1994)	2, 4, 6
United States v. *Alston*, No. 94-2195, 1996 WL 79826 (3d Cir. Feb. 26, 1996)	10, 11, 12
United States v. *Armstrong*, 951 F.2d 626 (5th Cir. 1992)	15
United States v. *Hawley*, 855 F.2d 595 (8th Cir. 1988), cert. denied, 489 U.S. 1020 (1989)	15
United States v. *Jackson*, 33 F.3d 866 (7th Cir. 1994), cert. denied, 115 S. Ct. 1316 (1995)	5, 10
United States v. *Levy*, 969 F.2d 136 (5th Cir.), cert. denied, 506 U.S. 1040 (1992)	15
United States v. *Stern*, No. 94-3319 (11th Cir. Sept. 20, 1995) (68 F.3d 485), petition for cert. pending, No. 95-965	10, 11
United States v. *Winfield*, 997 F.2d 1026 (4th Cir. 1993)	12, 13
United States v. *Zehrbach*, 47 F.3d 1252 (3d Cir.), cert. denied, 115 S. Ct. 1699 (1995)	4

Statutes and regulations:

Act of Sept. 23, 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253	4

Statutes and regulations—Continued: Page

18 U.S.C. 371 ..... 2, 5, 10, 11
26 U.S.C. 7201 2
26 U.S.C. 7206(1) 2
26 U.S.C. 7206(2) 2
31 U.S.C. 5312(a)(2)(K) 15
31 U.S.C. 5313 (1988) 2, 14
31 U.S.C. 5313(a) 15
31 U.S.C. 5322(a) (1988) 11
31 U.S.C. 5322(b) (1988) 2, 4, 14
31 U.S.C. 5324 (Supp. IV 1992) 2, 4, 11
31 C.F.R.:
Section 103.11(f) (1995) (redesignated as Section 103.11(i)) 15
Section 103.11(n)(3) (1995) (redesignated as Section 103.11(z)) 15
Section 103.22(a) 3

Miscellaneous:

60 Fed. Reg. (1995):
p. 228 15
p. 44,144 15

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 60 F.3d 948.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1995. A petition for rehearing was denied on October 3, 1995. Pet. App. 1b. The petition for a writ of certiorari was filed on January 2, 1996 (a Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioners were convicted of conspiring to defraud the United States by impeding

the lawful functions of the Internal Revenue Service, in violation of 18 U.S.C. 371; aiding and assisting the filing of false tax returns, in violation of 26 U.S.C. 7206(2); failing to meet reporting requirements for large cash transactions, in violation of 31 U.S.C. 5313 (1988) and 5322(b) (1988); and willfully structuring transactions to evade the currency transaction reporting requirements, in violation of 31 U.S.C. 5322(b) (1988) and 5324 (Supp. IV 1992). Pet. App. 3a; Pet. C.A. App. 92-94.[1] Petitioner Seth Wapnick was also convicted of making false statements on his tax return, in violation of 26 U.S.C. 7206(1). Pet. App. 3a, 6a.[2] The district court set aside the "structuring" convictions in light of this Court's intervening decision in *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994). Based on the remaining convictions, petitioners were each sentenced to serve 24 months' imprisonment, to be followed by three years' supervised release, and to pay a fine of $10,000. The court of appeals affirmed. Pet. App. 1a-19a.

1. Petitioners worked for a tax preparation service called Harold Wapnick & Sons, which was headed by their father and co-defendant, Harold Wapnick. The

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[1] Sections 5322(b) and 5324 (31 U.S.C.) were amended in 1994. See note 3, *infra*.

[2] Petitioners' co-defendants, Harold Wapnick and Steven Wolfson, were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and aiding and assisting the filing of false tax returns, in violation of 26 U.S.C. 7206(2). Harold Wapnick was also convicted of failing to meet reporting requirements for large cash transactions, in violation of 31 U.S.C. 5313 (1988) and 5322(b) (1988); willfully structuring currency transactions to evade the reporting requirements, in violation of 31 U.S.C. 5322(b) (1988) and 5324 (Supp. IV 1992); and tax evasion, in violation of 26 U.S.C. 7201.

business prepared tax returns for a large number of New York City cab drivers. Petitioners and their co-defendants prepared numerous tax returns falsely understating the income of cab drivers and coached some drivers to falsify records to support the false returns. Pet. App. 4a-7a.

In addition to the tax preparation service, petitioners and Harold Wapnick conducted loan and check-cashing operations. In the latter venture, the Wapnicks routinely cashed third-party checks for more than $10,000, but they never filed currency transaction reports (CTRs) for those transactions. Pet. App. 7a-8a, 14a. Between 1984 and 1988, the Wapnicks cashed more than $6 million in checks. *Id.* at 7a; Gov't C.A. Br. 19-21, 52.

Harold Wapnick hid the income from the loan and check-cashing operations by depositing it in 13 corporate accounts at Republic National Bank. Pet. App. 7a. To fund the operations, the Wapnicks often in a single day made multiple withdrawals from the bank accounts that totaled more than $10,000 but were individually for lesser amounts. Although the individual withdrawals fell below the $10,000 amount prescribed by regulation, 31 C.F.R. 103.22(a), the suspicious nature of those withdrawals led bank officials to begin reporting them on CTRs. Pet. App. 8a.

Petitioner Seth Wapnick also operated a separate business that leased taxicab medallions. He underreported his income from that business on his federal income tax returns for 1986 and 1987. Pet. App. 7a-8a.

2. The district court instructed the jury that, with respect to the counts that charged petitioners with structuring transactions to evade the currency transaction reporting requirements, the jury should

find petitioners guilty if it found that they knew of those requirements and deliberately acted to evade them. Pet. C.A. App. 364-366. The court instructed the jury that it was not required to find that petitioners knew that structuring was unlawful. *Id.* at 365. After trial, the court set aside petitioners' convictions on the "structuring" counts in light of *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994), which held that, to satisfy the willfulness element of the offense in a structuring prosecution, the government must prove that the defendant knew that his conduct was illegal. Pet. App. 3a.[3] The district court did not, however, set aside petitioners' convictions for conspiring to defraud the United States by impeding the functions of the IRS.

3. The court of appeals affirmed. Pet. App. 1a-19a. As relevant here, it rejected petitioners' argument that *Ratzlaf* required the vacatur of not only their structuring convictions but also their convictions for conspiring to defraud the United States.[4] The court

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[3] In the wake of *Ratzlaf*, Congress amended 31 U.S.C. 5322(b) and 5324. See Act of Sept. 23, 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253. Under the amended provisions, the government need not prove that the defendant in a structuring prosecution knew that his or her conduct was illegal. See *United States* v. *Zehrbach*, 47 F.3d 1252, 1261-1262 & n.7 (3d Cir.) (en banc), cert. denied, 115 S. Ct. 1699 (1995).

[4] In rulings that petitioners do not challenge in this Court, the court of appeals also held that the vacatur of petitioners' structuring convictions did not "taint[]" their convictions for failing to file CTRs in connection with their check-cashing business (Pet. App. 12a-15a); that the district court correctly instructed the jury on what constitutes a "sham corporation" (*id.* at 15a-16a); and that the evidence seized under a search warrant was properly admitted (*id.* at 17a-19a). The court of appeals rejected without discussion petitioners' remaining con-

observed that petitioners were not charged under 18 U.S.C. 371 with conspiring to commit a crime, but with conspiring to defraud the United States by "impair[ing] the [Internal Revenue Service's] ability to collect information on cash transactions exceeding $10,000." Pet. App. 11a.[5] In light of that charge, the court explained, the government was not required to prove a violation of the structuring provision. *Ibid.* The court accordingly held that the vacatur of the structuring convictions did not compel the vacatur of the conspiracy convictions. *Id.* at 11a-12a. In so holding, the court followed the Seventh Circuit's decision in *United States* v. *Jackson*, 33 F.3d 866 (1994), cert. denied, 115 S. Ct. 1316 (1995), which rejected an argument "virtually identical" to petitioners'. Pet. App. 11a.

The court of appeals rejected petitioners' assertion that, "even though the indictment did not specify the substantive crime of structuring as an object of the § 371 conspiracy, the government's argument and the jury charge permitted the jury to find that structuring was not only a *means* to the end of fraud, but that it was the fraud itself." Pet. App. 12a. The court stated: "[O]ur reading of the record does not persuade us that the district court and the government

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tentions, including their contention, which they renew in this Court (Pet. 17-23), that they were not required to file CTRs for their check-cashing operations. See Pet. App. 19a.

[5] Section 371 (18 U.S.C.) provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be [guilty of a crime] * * *.

effectively amended the indictment by permitting the jury to find structuring to be an end, rather than a means to an end, of the conspiracy." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 3-4, 8-17) that *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994), required the vacatur of not only their structuring convictions but also their conspiracy convictions. They argue as follows: One object of the conspiracy with which they were charged was to violate the structuring statute; that object was legally insufficient in light of *Ratzlaf*; and under *Griffin* v. *United States*, 502 U.S. 46 (1991), a conspiracy conviction must be reversed when one of the charged objects is held to be legally insufficient.

The premise of petitioners' argument is mistaken. The object of the conspiracy with which they were charged was not to violate the structuring statute. Rather, the indictment charged that the object of the conspiracy was

> to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the U.S. Treasury Department in its authorized functions of (a) ascertaining, computing, assessing and collecting revenue, namely income taxes, and (b) collecting information regarding transactions in United States currency in excess of $10,000.

Indictment ¶ 12, at 4 (Pet. C.A. App. 69). Although the conspiracy count of the indictment also alleged that petitioners structured currency transactions with Republic National Bank in order to evade the currency reporting requirements, that conduct was

alleged to be merely one of the many means by which petitioners sought to achieve their object of defrauding the IRS. Indictment ¶ 23, at 7 (Pet. C.A. App. 72).[6] It is well settled that the government is not required to prove that any particular means used to carry out a conspiracy is itself a crime. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946). Thus, the government was entitled, in alleging and proving the conspiracy charge, to rely upon petitioners' structuring conduct and evidence of that conduct, regardless of whether that conduct constituted a separate, substantive offense. The court of appeals therefore correctly held that petitioners' conspiracy convictions were not undermined by this Court's holding in *Ratzlaf* that such structuring conduct does not constitute a substantive offense in the absence of knowledge of illegality. Pet. App. 10a-12a.

The court of appeals was also correct in rejecting petitioners' contention that certain comments by the prosecutor and jury instructions could have led the jury to believe that the object of the conspiracy was to violate the structuring law. Pet. App. 12a. In renewing that contention in this Court (Pet. 10-14), petitioners cite the prosecutor's comment during summation that structuring conduct "can impair and

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[6] The indictment also alleged numerous other means, including: defendants' preparation of false tax returns for taxi drivers; defendant Harold Wapnick's underreporting of his income; petitioner Seth Wapnick's underreporting of income from leasing taxi medallions; and petitioners' cashing of third-party checks from businessmen allegedly attempting to conceal their currency transactions and income from the IRS. Pet. C.A. App. 69-72.

impede the IRS in discovering financial information and assuring compliance with the revenue laws." Pet. 12 (emphasis omitted). That statement merely indicated that structuring was one of the means by which petitioners sought to achieve their conspiratorial objective of defrauding the IRS. It was therefore consistent with the allegations of the indictment. The comment did not state or imply (any more than did the indictment) that, if the jury found petitioners guilty of the structuring charges, it was compelled also to find them guilty of the conspiracy charge.

Nor did the jury instructions so state or imply. Petitioners' argument to the contrary (Pet. 13) is based primarily on a single sentence in the instructions, which stated (Pet. C.A. App. 373): "You may find the defendants guilty of the crime of conspiracy to defraud the United States even though the substantive crimes which were the objects of the conspiracy were not actually committed." Read in context, that statement could not reasonably have been understood to alter the conspiratorial objective charged in the indictment. The district court began its instructions on the conspiracy count by reading the charge as set forth in the indictment. *Id.* at 367-372; Tr. 10,525-10,530. Thereafter, the court explained (Pet. C.A. App. 372):

> The crime of conspiracy to defraud the United States is an independent offense. It is separate and distinct from the actual violation of any specific federal laws.

The court stated that one of the elements of the conspiracy offense was an "unlawful agreement" (*id.* at 373), and it described the nature of the "unlawful

agreement" charged in the indictment as follows (*id.* at 373-374):

> In this case, the unlawful agreement charged in the indictment is a conspiracy to defraud the United States[,] which means an agreement or understanding to interfere with, or obstruct one of the lawful governmental functions of the United States by deceit, craft or trickery, or by means that were dishonest.

Subsequently, the court explained that the defendants were charged "with conspiring to accomplish two illegal objectives, namely, 1) impairing the Internal Revenue Service in computing income, and 2) impairing the Internal Revenue Service in collecting information about transactions in currency." Pet. C.A. App. 376.[7] The court also stated: "If the government fails to prove that at least one of the objectives was an object of the conspiracy in which the defendants participated, then you must find the defendants not guilty on the conspiracy count." *Ibid.* Thus, read as a whole, the jury instructions properly distinguished the substantive charges from the conspiracy charge and directed the jury to find petitioners guilty of the conspiracy charge only if it found that they had agreed to one of the illegal objectives specified in the indictment.

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[7] The district court was clearly referring to those two unlawful objectives when it instructed the jury that it had to find beyond a reasonable doubt that at least two of the defendants agreed "to work together in furtherance of the unlawful schemes alleged in the indictment." Pet. C.A. App. 376. Petitioners' reliance (Pet. 13 n.3) on that portion of the instructions is therefore misplaced.

The court of appeals' affirmance of petitioners' conspiracy convictions accords with *United States* v. *Jackson*, 33 F.3d 866 (7th Cir. 1994), cert. denied, 115 S. Ct. 1316 (1995). The defendants in *Jackson* were convicted of structuring violations and conspiracy to defraud the IRS. 33 F.3d at 867-869. On appeal, the government acquiesced in the vacatur of the structuring convictions in light of *Ratzlaf*. *Id.* at 869. The defendants argued that *Ratzlaf* also required the vacatur of their conspiracy convictions. *Id.* at 869-870. Like the court of appeals in this case, the Seventh Circuit in *Jackson* rejected that argument. It observed that, because "the government did not have to demonstrate that the defendants violated the antistructuring laws" to establish the conspiracy, the vacatur of the structuring convictions in light of *Ratzlaf* "has no bearing on the defendants' § 371 convictions."[8] *Id.* at 871.[9]

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[8] Petitioners assert (Pet. 15) that *Jackson* is distinguishable because in that case "neither the indictment nor the government identified the substantive [structuring] violation as an objective of the conspiracy." As explained in the text, *supra*, it was also true in this case that neither the indictment nor the government's proof identified structuring as the conspiratorial objective.

[9] The decision below also accords with *United States* v. *Stern*, No. 94-3319, judgment noted at 68 F.3d 485 (11th Cir. Sept. 20, 1995) (Table), petition for cert. pending, No. 95-965 (filed Dec. 18, 1995). Stern was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371, by impeding the IRS's collection of information regarding CTRs. On appeal, he argued that the district court should have instructed the jury that, to find him guilty on the conspiracy-to-defraud charge, it had to find that he willfully violated currency transaction reporting requirements. See Gov't C.A.

In *United States* v. *Alston*, No. 94-2195, 1996 WL 79826 (Feb. 26, 1996), the Third Circuit reversed a conspiracy conviction in light of *Ratzlaf*, but in circumstances quite different from those of this case. Alston had been charged in one count with conspiring to defraud the United States and the Department of the Treasury, and conspiring to structure transactions with the purpose of evading the CTR requirements, in violation of 18 U.S.C. 371. In a separate count, he was charged with the substantive offense of structuring, in violation of 31 U.S.C. 5324 (Supp. IV 1992) and 5322(a) (1988). *Alston*, slip op. 2. Insofar as the conspiracy to defraud was concerned, the indictment "allege[d] no more than a conspiracy to defraud the United States by structuring," *id.* at 3; see also *id.* at 12-13, and "the government offered the same body of evidence * * * to support both the charge against Alston for 'conspiracy to defraud' and the charge against him for 'conspiracy to structure.'" *Id.* at 13. In those circumstances, the Third Circuit held that, "to obtain a conviction under either the 'defraud' or 'offense' clause of § 371, the government had to prove that Alston knew that his structuring activities were illegal." *Id.* at 14.

The Third Circuit was careful, however, "not [to] foreclose the possibility of convicting a defendant under § 371's 'defraud' clause based on charges *in addition to* or *different from* pre-1994 acts of structuring." Slip op. 14; see also note 3, *supra* (describing 1994 amendments to structuring statute). It distinguished "cases that have upheld convictions for conspiracy to defraud under § 371 [and that] have all

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Br. at 15 in *United States* v. *Stern*, *supra*. The Eleventh Circuit affirmed the conspiracy conviction.

involved additional charges in the indictment and additional evidence produced at trial, over and beyond that required for a conviction for pre-1994 structuring." Slip op. 14. In particular, the *Alston* court distinguished *Jackson*, *inter alia*, on the ground that *Jackson* "involved extensive 'other evidence' beyond structuring activity demonstrating a conspiracy to defraud the United States." *Id.* at 15. That same feature distinguishes the present case from *Alston*; the indictment in this case alleged, and the evidence showed, that petitioners and their co-defendants sought to defraud the government in many ways in addition to their structuring conduct. See note 6, *supra*.[10]

The Fourth Circuit reviewed conspiracy convictions involving CTR requirements in *United States* v. *Winfield*, 997 F.2d 1076 (1993), but its decision leaves unclear what position that court would take on the question presented here. The defendants in *Winfield* were indicted for conspiracy to commit the substantive offense of structuring transactions to avoid the CTR requirements, but the relevant count of the indictment was captioned "Conspiracy to Defraud." The judge instructed the jury that the defendants were charged with conspiracy "to defraud the United States in violation of 18 U.S.C. § 371 by conspiring to obstruct the CTR filing requirement of 31 U.S.C. §§ 5322 and 5324," and the court of appeals

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[10] Furthermore, the 1994 amendments to the structuring statute deprive of any continuing importance the question whether convictions for conspiracy to defraud the United States must be vacated in light of the vacatur of structuring convictions for *Ratzlaf* error. See *Alston*, slip op. 7 n.12 ("In light of the 1994 amendment to [31 U.S.C.] 5324, we observe that the instant situation is unlikely to occur again.").

ostensibly set out to review the sufficiency of the evidence in support of that theory. *Id* at 1081. The court correctly stated that conspiring to defraud requires only proof of an "intent to defraud the United States" (*id.* at 1082); the court also stated that, "to be convicted of conspiracy to structure transactions to avoid CTR requirements, a party must have knowledge of the reporting requirements and act[] to avoid them," *ibid.* (internal quotation marks omitted), indicating that the court may have viewed the charge as embracing both a conspiracy to defraud the United States and a conspiracy to violate the CTR reporting requirements. The court analyzed the challenge brought by the first of the two defendants by reviewing the sufficiency of the "prosecution's evidence of *a conspiracy to obstruct the CTR requirements*." *Ibid.* (emphasis added). When the court reviewed the sufficiency of the evidence with respect to the second defendant, it looked to "[t]he evidence connecting [the second defendant] to a *conspiracy to defraud the government by obstructing the filing of CTR's*," *id.* at 1083 (emphasis added), but then twice described the charge against that defendant as "*conspiracy to violate the CTR requirements*," *ibid.* (emphasis added). *Winfield* has never been cited by the Fourth Circuit for any proposition. In light of the confusion evident in the opinion regarding the nature of the charges analyzed by the court of appeals, it is too early to tell whether the position of the Fourth Circuit conflicts with that taken by the Second Circuit below, the Seventh Circuit in *Jackson*, and the Eleventh Circuit in *Stern* (see note 9, *supra*).

2. Petitioners also contend (Pet. 4, 17-23) that they were not required to file CTRs in connection with

their check-cashing business and that their convictions under 31 U.S.C. 5313 (1988) and 5322(b) (1988) for failing to do so are therefore invalid. That contention lacks merit.

Petitioners' primary argument is that they were not required to file a CTR each time they cashed a check for more than $10,000 for one of their customers, because Republic National Bank filed a CTR when petitioners withdrew money from one of 13 corporate accounts to obtain the cash to pay their customers. See Pet. 17-18, 23. That argument confuses two separate sets of transactions. As the court of appeals correctly recognized, petitioners' transactions with the Bank were "distinct and separable" from their transactions with the customers of their check-cashing business: "The transactions underlying the structuring counts were the Wapnicks' multiple cash withdrawals of amounts just under $10,000 from Republic National Bank; by contrast, the transactions underlying the CTR charges were the Wapnicks' cashing of their customers' unendorsed, third-party checks in amounts exceeding $10,000." Pet. App. 14a. The separate nature of petitioners' transactions with the Bank, on the one hand, and their transactions with the customers of their check-cashing business, on the other hand, is underscored by the fact that the former invariably involved amounts of less than $10,000, whereas the latter invariably involved amounts of more than $10,000. See *Id.* at 8a; Gov't C.A. Br. 19-21. Thus, contrary to petitioners' suggestion (Pet. 18), they were more than

merely factotums who "delivered" checks and cash back and forth between the Bank and its customers.[11]

Petitioners err in claiming (Pet. 18-21) that their check-cashing business was not a "financial institution" within the meaning of 31 U.S.C. 5313(a). The statute defines that term to include a "cashier of * * * checks," 31 U.S.C. 5312(a)(2)(K), and it is defined by regulation specifically to include "[a] currency dealer or exchanger, including a person engaged in the business of a check casher." 31 C.F.R. 103.11(n)(3);[12] see also 31 C.F.R. 103.11(f); cf. *United States* v. *Levy*, 969 F.2d 136, 140 (5th Cir.), cert. denied, 506 U.S. 1040 (1992).[13] Petitioners and Harold Wapnick were clearly acting as a "financial institution" under the statute and regulation. See *United States* v. *Hawley*, 855 F.2d 595, 601 (8th Cir. 1988) (check-cashing business was "financial institution" under prior version of regulation), cert. denied, 489 U.S. 1020 (1989); see also *United States* v. *Armstrong*, 951 F.2d 626, 629-630 (5th Cir. 1992) (bank's chairman

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[11] It undermines petitioners' argument that the government "could not connect a single third-party businessman's check with a specific check cashed at the bank." Pet. 23. Petitioners prevented such a connection by using a multi-step process: in one step, they deposited their customers' checks for amounts of more than $10,000 into one of the 13 bank accounts; in a separate step, they wrote checks against the accounts for amounts of less than $10,000.

[12] Although some of petitioners' convictions for willfully failing to file CTRs were based on a prior version of the regulation defining "financial institution," see Pet. C.A. App. 348, petitioners attach no significance to that fact.

[13] Effective April 1, 1996, 31 C.F.R. 103.11(f) was redesignated 103.11(i), and 31 C.F.R. 103.11(n)(3) was redesignated 103.11(z)(3). 60 Fed. Reg. 228 (1995); *id.* at 44,144.

of the board was a "financial institution" when he personally exchanged $150,000 money order for $150,000 cash obtained through the bank).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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